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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1217

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,

*Cross-Petitioners,*

v.

HENRY A. KISSINGER, *et. al.*,

*Respondents.*

## REPLY BRIEF FOR CROSS-PETITIONERS

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THE CASILLAS PRESS, INC.—1717 K Street N. W.—Washington, D. C.—223-1220

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This Reply Brief is occasioned by the Brief of the federal respondents, who support the grant of this petition and the petition in No. 78-1008, urge that the Court decide some questions presented by the petitions but not others, and suggest that this case be set for argument in tandem with *Forsham v. Califano*, No. 78-1118. Cross-petitioners are disturbed by several aspects of the Government's position and believe their concerns should be brought to the attention of the Court before it acts on the pending cross-petitions.

1. The Government contends that the District Court's application of the Freedom of Information Act ("FOIA") to documents that are no longer in the State Department's physical custody raises issues "of sufficient general importance to warrant review by this Court." Brief for the

Federal Respondents ("Br.") 9. The history of this litigation, however, reveals that the Government's interest in these issues has surfaced at a remarkably late date. Although the District Court required the Department of State to retrieve the notes of Mr. Kissinger's conversations from the Library of Congress, the Government did not appeal from its decision. Instead, it appeared in the Court of Appeals solely as an *amicus curiae* and advised the Court that it "had proceeded at the trial level in a nominal capacity."[1]

Because the government defendants did not object to the order entered by the District Court, the Court of Appeals found that it was "unnecessary" to consider most of the issues raised by Mr. Kissinger, including the application of the FOIA to documents which were no longer in the Department's physical custody. Pet. App. 49a. For similar reasons, there is substantial ground to question whether this issue may be considered by this Court. Since the Government did not object in the lower courts to retrieving documents from a non-agency for disclosure under the FOIA, there is no party in this litigation with standing to challenge that retrieval now. At the very least, the Government's posture in the courts below contradicts its belated conclusion that this issue has great "general importance" and diminishes the weight which that conclusion should receive from this Court.

2. The Government also maintains that this case is "closely related" to *Forsham v. Califano*, No. 78-1118, and implies that the decisions in these two cases by the Court of Appeals for the District of Columbia Circuit rest on divergent rationales. Br. 9. We believe that, taken together, these decisions reflect a coherent and correct interpretation of the FOIA by the Court of Appeals, and that further review by this Court is unnecessary.

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[1] Brief for the United States as Amicus Curiae 3.

There are important differences between the raw research data at issue in *Forsham* and the notes of Mr. Kissinger's telephone conversations at issue here. The raw data in *Forsham* were created by private universities which were federal grantees. They had always been held at the University of Maryland, outside the physical custody of any federal agency, and were not, and had never been, in the possession of any federal employee. By contrast, the notes of Mr. Kissinger's telephone conversations were generated by a cabinet officer to aid in transacting official business, were used by other Department employees for this purpose, and remained in the State Department's possession for an extended period before leaving government custody.

In holding that the raw data in *Forsham* were not "records" subject to the FOIA, the Court of Appeals rested its decision not on the physical location of the data but on the lack of significant government involvement in their creation and use. 587 F.2d at 1138-39. In effect, the Court held that the data were not agency records because they were not government "property." Indeed, all three members of the *Forsham* panel agreed that government participation in the creation and use of disputed documents, and not physical possession, should determine whether the FOIA applies. *Id.* at 1136, 1139 and 1140.

The lower courts invoked the same rationale in deciding this case. The District Court determined that the notes of Mr. Kissinger's conversations had been "prepared and transcribed 'in the discharge of his official duties'." Pet. App. 58a. It therefore concluded that the notes were still "property" of the Department of State and, despite their physical location, were subject to disclosure under the FOIA. The Court of Appeals agreed with this approach. Pet. App. 49a. Thus, there is no conflict between the decisions below in *Forsham* and this case. While involving divergent facts, each decision recognizes that the FOIA applies to documents which are government property,

regardless of their physical location. We submit that this doctrine is correct and need not be re-examined by this Court.

3. The Government acknowledges that the notes of Mr. Kissinger's conversations were Department "records" at the time of their removal from Department custody. Br. 10. Cross-petitioners are, of course, in full accord with this conclusion. However, the Government then argues that the legality of the notes' removal from Department possession has no bearing on whether they remain subject to the FOIA. Hence, the Government urges, the Court should determine whether the FOIA is applicable to the notes without regard to whether they were agency "records" at the time that they left the Department. *Id.* 11. We believe that these two issues cannot be divorced, and that any effort to consider one in isolation from the other may lead to a misguided decision.

The FOIA applies to agency "records." 5 U.S.C. § 522(a)(4)(B). A document created to facilitate agency business but removed from its custody in accordance with the document disposal procedures of the Federal Records Act is no longer owned or controlled by the agency. We agree that such a document, which has been disposed of *lawfully*, is not a "record" subject to the FOIA and the agency cannot be compelled to retrieve it in response to an FOIA request.

A very different situation exists, however, when a document has been removed from agency custody, not in accordance with the record disposal procedures of the Federal Records Act, but as a result of the unauthorized acts of individual agency officials. Such documents do not cease to be agency "records" merely because they are no longer in the agency's physical custody. In every respect except physical location, they remain agency property and continue to be subject to the agency's legal control. The application of the FOIA to unlawfully removed records should not depend on whether the agency has taken steps to retrieve them. But for that removal, these records would

still be available for FOIA disclosure. It would contravene the intent of Congress in enacting the Act if the public's rights of access were extinguished whenever agency employees remove records in violation of law and the agency takes no action to secure their return.

The availability of FOIA relief in these limited circumstances would not impose undue burdens on the Government. The Federal Records Act, augmented by regulations of GSA and individual agencies, contains a comprehensive scheme for reviewing records that agencies wish to discard and determining whether those records are no longer necessary for the transaction of government business. When records have been removed from agency custody in accordance with these requirements, the agency's actions will normally be unreviewable under the FOIA, and the documents will not be subject to FOIA disclosure. Under the decisions of the courts below, a remedy under the Act would be available only when — as in this case — applicable procedures for records disposition have been ignored and the agency has made no effort to recover wrongfully removed documents. Contrary to the Government, applying the FOIA in this uncommon situation will not increase the duties of federal agencies under the FOIA or otherwise impede their operations.

4. While supporting the grant of certiorari in No. 78-1217, the Government urges the Court not to determine whether the portions of the White House notes which relate to Mr. Kissinger's National Security Council duties are subject to FOIA disclosure in this suit. Br. 8-9. This position is puzzling. It is customary for the President's National Security Advisor to serve as the NSC's Chief Executive. Whether the FOIA applies to documents generated by the National Security Advisor in this capacity is therefore an issue of broad importance which will recur if not definitively resolved here. Moreover, documents originated by one agency are frequently used by other agencies. If, as the Court below held, FOIA requests for such documents must be directed to the originating agency,

FOIA requesters will experience increased delays and burdens. Thus, this issue, too, has broad implications for effective implementation of the FOIA. Finally, piecemeal review of the portion of the lower court's decision relating to the White House notes would be impractical and unfair. If the Court agrees to consider whether these notes should be disclosed to cross-petitioners, it should take into account all possible grounds on which such disclosure might be based.

Mr. Kissinger has suggested that, in the proceedings below, cross-petitioners did not focus on his NSC duties in a timely manner and, hence, the issue was inadequately considered by the lower courts.[2] This contention is misleading and inaccurate. By seeking access to the notes of Mr. Kissinger's conversations as Assistant to the President, cross-petitioners' Complaint necessarily encompassed conversations relating to the NSC; as noted above, the Assistant to the President for National Security Affairs has traditionally functioned as the Council's chief executive. Moreover, when Mr. Kissinger opposed their motion for summary judgment by arguing that the White House Office is exempt from the FOIA, cross-petitioners responded by pointing out that the Executive Office, including the NSC, is not within this exemption. As a result, both before and after the parties' cross-motions for summary judgment were decided by the District Court, the special status of the NSC notes was briefed thoroughly by cross-petitioners and Mr. Kissinger.[3] The issue was then briefed again in the

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[2]Respondent Henry A. Kissinger's Brief in Opposition 8-9.

[3]*E.g.*, Plaintiffs' Reply Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment, in Opposition to Defendant Kissinger's Motion for Summary Judgment and in Opposition to the Government's Request for Production of Documents, August 8, 1977, at 45-46; Reply Memorandum of Points and Authorities by Defendant Henry A. Kissinger in Support of His Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, August 22, 1977, at 12-13.

Court of Appeals by all parties, including the Government, and decided on its merits. Thus, the application of the FOIA to transcripts of conversations relating to Mr. Kissinger's NSC duties was raised in a timely manner below and is properly before this Court now.

The Court should grant the petition for a writ of certiorari in No. 78-1217 and deny the petition in No. 78-1088.

Respectfully submitted,

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